INTERIOR BOARD OF INDIAN APPEALS

Bill E. Fenner and Liane Johnson v. Billings Area Director, Bureau of Indian Affairs

29 IBIA 116 (03/11/1996)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

BILL E. FENNER, Appellant	:	Order Affirming Decisions as Modified
LIANE JOHNSON, Appellant	:	
v.	:	Docket Nos. IBIA 95-89-A IBIA 95-95-A
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	March 11, 1996

These are appeals from a February 27, 1995, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the award of an agricultural lease for Allotment 2654-A on the Blackfeet Reservation. For the reasons discussed below, the Board affirms the Area Director's decision as modified herein.

Allotment 2654-A contains approximately 280 acres. Fifty percent of the ownership interests in the allotment are held by the United States in trust for Indians and 50 percent are owned in fee by non-Indians. 1/ Liane Johnson, appellant in Docket No. IBIA 95-95-A, is the beneficial owner of a 1/60 trust interest, which she purchased in September 1990.

Johnson was formerly lessee under a five-year lease covering several Blackfeet allotments, including Allotment 2654-A. That lease expired on December 31, 1994.

In October 1994, the Blackfeet Agency, BIA, included Allotment 2654-A in a lease advertisement for five-year leases to commence on January 1, 1995. The high bid for Allotment 2654-A was submitted by Bill E. Fenner, appellant in Docket No. IBIA 95-89-A. Johnson also submitted a bid. The Agency evidently informed both Fenner and Johnson that it intended to award the lease to Fenner.

On October 13, 1994, Johnson, through her attorney, protested the award of the lease to Fenner. Johnson stated that she was the lessee of the 50 percent fee interest in the allotment. She contended that the 50 percent interest she leased, together with the 1/60 trust interest she owned, gave her control of 51 percent of the allotment and that she should therefore be given the right to match Fenner's bid.

1/ Appellant Liane Johnson states that the entire fee interest is presently owned by the Hidden Lake Hutterite Colony. See footnote 6, infra. BIA does not maintain records on the ownership of fee interests in Indian trust property

The Superintendent allowed Johnson to match Fenner's bid and, on November 17, 1994, informed Fenner that the lease had been awarded to Johnson. The Superintendent's letter stated: "Mrs. Johnson owns an undivided 504/30240 [or 1/60] trust interest in this land. As previous lessee, she was given the option to continue to lease her land" (Superintendent's Nov. 17, 1994, Letter at 1).

Fenner appealed to the Area Director who, on February 27, 1995, vacated the Superintendent's decision and remanded the matter to him with instructions to approve the lease to Johnson for 1995 only and to readvertise the lease for a five-year term beginning in 1996. 2/

The Area Director discussed 25 CFR 162.2(a)(4), upon which he understood the Superintendent's decision to have been based. 3/ He concluded, however, that the "owner's use" proviso in that section did not grant Johnson any special privileges as a landowner because she had acquired her trust interest as a purchaser, not as an heir or devisee.

The Area Director also discussed 25 U.S.C. § 3715(c)(1) (1994) which, in a December 22, 1994, memorandum to the Area Director, the Superintendent had cited as additional authority for his decision. 4/ The Area Director concluded that this provision also granted Johnson no special privileges.

Concerning his instructions to readvertise the lease, the Area Director stated:

> The circumstances of this case are complex in that 50 percent of the tract is in fee status, Liane Johnson contends she leases that portion, and the BIA does not have jurisdiction of the fee

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2/ Fenner evidently failed to serve his appeal documents on Johnson, and Johnson was apparently unaware of his appeal until the Area Director issued his decision.

The Area Director should have required Fenner to serve his appeal documents on Johnson and should have allowed Johnson an opportunity to respond. E.g., Cheyenne River Sioux Tribe v. Aberdeen Area Director, 23 IBIA 103 (1992). However, Johnson has had a full opportunity to present her arguments before the Board, and a remand for the purpose of correcting the Area Director's error would only serve to delay resolution of this matter. Therefore, the Board deems the Area Director's error to have been cured in these proceedings.

3/ 25 CFR 162.2(a) provides:

"The Secretary may grant leases on individually owned land on behalf of: * * * (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees."

4/ 25 U.S.C. § 3715(c)(1) (1994) provides:

"Nothing in this section [concerning Secretarial and tribal authority over the leasing of Indian agricultural lands] shall be construed as limiting or altering the authority of an individual allottee or Indian tribe in the legal or beneficial use of his, her, or its own land or to enter into an agricultural lease of the surface interest of his, her, or its allotment or land under any other provision of law."

> portion. It is late in the season to advertise the tract and have the lease ready in time for planting in the 1995 growing season, to assure income to the owners. Advertising the tract would give all parties an opportunity to submit new bids on the allotment on equal basis.

(Area Director's Feb. 27, 1995, Decision at 3).

On appeal to the Board, Fenner contends that he is a "Bona Fide Indian farmer and rancher who needs this lease for his livelihood" (Fenner's Notice of Appeal at 2). He further contends that he was legally entitled to the lease because it was awarded to him upon his high bid. 5/ He objects to the grant of even a one-year lease to Johnson, requesting that the lease be awarded to him for 1995 as well as the remainder of the originally advertised term. Fenner also contends that, during the previous lease term, Johnson did not farm the allotment herself but instead illegally subleased it to the Hutterite Colony. He requests that BIA investigate the matter.

In her appeal to the Board, Johnson again contends that she should be awarded the lease because she controls a greater than 51 percent interest in the allotment by reason of her own 1/60 trust interest and her lease of the 50 percent fee interest. 6/ She further contends that it would be a breach of trust for BIA to approve a lease of the trust interest to Fenner, apparently because, if Johnson leased only the fee interest, she would not be subject to control by BIA. Johnson also suggests that, under Montana law, she has the right to use the property without paying rent to her co-tenants. Finally, she contends that she is better able than Fenner to farm the property because she has more experience and better equipment and lives closer to the property.

To the extent Johnson is contending that Montana law gives her rights to the use of Indian trust property, the Board rejects that contention. It is not state but Federal law (and in some instances tribal law) which governs the use of Indian land and the manner in which interests in Indian land may be acquired. E.g., 25 U.S.C. §§ 177, 415, 3711-3715 (1994). Montana law grants Johnson no rights with respect to the trust interests in Allotment 2654-A.

5/ Nothing in the record indicates that the lease was actually awarded to Fenner. It is evident, however, that the Agency originally intended to award the lease to him.

6/ Johnson states:

> "On or around October 1992, [Johnson and her husband] decided to lessen their agricultural responsibilities and thereby sold much of their farm land to the Hidden Lake Hutterite Colony. As a part of the sale Johnson sold a 50% fee simple interest in the subject property to the Colony. At the same time the Colony leased their interest in said property back to Johnson so that she could continue farming the property [footnote omitted]" (Johnson's Opening Brief at 2-3).

Although Johnson's brief stated that a copy of this lease was attached, in fact no such copy was attached. Nor was the lease otherwise furnished to the Board.

It is possible that Johnson intends to rely in part upon 25 CFR 162.2(a)(4) and is contending, in essence, that as a trust interest owner who has been using the property (i.e., under her former lease), she has the right to continue that use. As the Area Director held, however, the proviso in section 162.2(a)(4) applies only to heirs and devisees, not to those who acquired their interests through purchase, as Johnson did. 7/ Further, Johnson cannot claim any right to a new lease by virtue of having previously leased the trust interests in the property. 25 CFR 162.5(e) provides: "No lease shall provide the lessee a preference right to new leases nor shall any lease contain provisions for renewal, except as otherwise provided in this part."

The Board finds that Johnson did not, as a matter of law, have a right to the award of a lease to the trust interests in Allotment 2654-A.

The Board also rejects Fenner's contention that he had a right to the lease. Even though Fenner made the high bid, BIA retained the discretion to award the lease to another party matching the high bid, as long as BIA was able to support its decision. E.g., Blackhawk v. Billings Area Director, supra, and cases cited therein; Vielle v. Billings Area Director, 15 IBIA 40 (1986). In this case, the Area Director concluded that the Superintendent did not have adequate reasons for his decision. In light of the discussion above, the Board agrees with the Area Director in this regard. It also agrees that this case should be returned to the Superintendent for further action.

The Board is not convinced, however, that the Superintendent should be directed to readvertise the lease. The bifurcated ownership of this allotment poses special problems which the Superintendent must take into consideration in awarding a lease of the trust interests. 8/ Under the circumstances, it is conceivable that negotiation of a lease may be more appropriate than advertising.

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7/ With respect to "owner's use" of fractionated allotments, some tribes have developed policies for their own reservations to supplement and/or interpret the BIA regulations. The Board is not aware of any such policy for the Blackfeet Reservation. The Crow Tribe, however, has such an "owner's use" policy. It explains the proviso in section 162.2(a)(4) thus: "In Order to Qualify for 'Owner's Use': 1. The applicant must be an Heir or devisee with an interest in the heirship land, thus preventing, for example, an individual from purchasing a small interest in heirship land and filing for Owner's Use on the entire tract [Emphasis in original]." See Blackhawk v. Billings Area Director, 24 IBIA 275, 279 n.3 (1993). Although the Crow Tribe's policy is, of course, not applicable here, it is cited to show how at least one tribe has interpreted the restriction to heirs and devisees.

Whatever BIA's reason for including the limitation in its regulations may have been, the fact of the limitation is clear. Only heirs and devisees may take advantage of the owner's use provision in section 162.2(a)(4).

8/ For instance, if the fee and trust interests are leased to different individuals, some special arrangement would have to be made to enable both to exercise their rights as lessees. Such an arrangement would require the cooperation of both lessees.

Accordingly, the Board modifies the Area Director's decision by deleting the requirement that the Superintendent readvertise the lease. Upon return of this matter to him, the Superintendent may determine whether advertisement or negotiation is more appropriate. If a lease is to be awarded to Johnson under either procedure, the Superintendent should require her to produce evidence that she is in fact the lessee of the fee interest in Allotment 2654-A. The Superintendent should also satisfy himself that Johnson is not, as Fenner contends, subleasing her leasehold of the trust interests to another party.

If necessary to ensure income to the Indian owners in 1996 pending final resolution of this matter, the Superintendent may extend the one-year lease to Johnson through the year 1996.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's February 27, 1995, decision is affirmed as modified by the deletion of the requirement that the Superintendent readvertise the lease. 9/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

9/ It is apparent that there is no entirely satisfactory way of leasing this allotment as long as it remains in bifurcated ownership. If the fee interest cannot be repurchased and taken into trust, BIA may wish to pursue a partition between the fee and trust interests.